BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLENDA R. URIE Claimant VS.	)	
	)	Docket No. 253,719
CONWELL CORPORATION Respondent AND	)	
CONTINENTAL CASUALTY COMPANY Insurance Carrier	)	

ORDER

Respondent appealed the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on July 19, 2000.

RECORD

The preliminary hearing record consists of claimant's July 11, 2000, deposition testimony and the July 18, 2000, preliminary hearing transcript with attached exhibits.

ISSUES

The ALJ found claimant suffered a neck injury that arose out of and in the course of her employment with respondent. Respondent was ordered to pay claimant temporary total disability benefits from October 6, 1999 through July 12, 2000, plus medical mileage.

On appeal, respondent contends that claimant's neck injury is not compensable because it occurred while she was on her way to assume her duties of employment and not during the time that she was performing her employment duties.

Conversely, claimant requests the Appeals Board to affirm the ALJ's preliminary hearing Order. The claimant contends that she injured her neck at work while performing necessary duties of her employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' briefs, the Appeals Board finds that the ALJ's preliminary hearing Order should be affirmed.

FINDINGS OF FACT

1. On September 15, 1999, the date of the alleged accident, claimant and her husband were employed by respondent as over-the-road semi-tractor truck drivers.

2. The tractor owned by the respondent was parked in the driveway at claimant's residence located in Sedan, Kansas.

3. Respondent's dispatcher called claimant and her husband on September 15, 1999, and notified them to make a rush pickup of a load of merchandise located in Booker, Texas. Claimant and her husband were not scheduled to pick up a load until the following day on September 16, 1999.

4. In preparing to leave for the rush pickup, claimant's husband performed the required pre-trip inspection of the tractor while claimant packed personal items and loaded those items along with the required logbooks into the tractor.

5. Claimant's husband had the tractor running and was waiting for claimant when she entered the tractor with the last load of personal items and the logbooks.

6. The required pre-trip inspection is the first activity reported in the logbook when a respondent-directed trip is commenced.

7. As claimant was entering the passenger door of the tractor with the load of personal items and the logbooks, she hit her head on the top of the passenger door frame of the tractor.

8. Claimant immediately experienced pain and discomfort in her neck. But she thought she had not suffered a severe injury and then decided to make the trip with her husband.

9. But the pain and discomfort worsened as she rode in the truck. She attempted to take her regular turn driving during the trip but had to quit driving because of the pain and discomfort in her neck. After the load was picked up, on the return trip home, they had to stop for a period of time because of claimant's worsening pain and discomfort.

10. After claimant reported the neck injury to respondent, she first was seen by her family physician, James M. McDermott, D.O., for the neck injury.

11. Claimant was then referred to neurosurgeon David G. Malone, M.D., located in Tulsa, Oklahoma. Dr. Malone had treated claimant for another neck injury earlier in 1999. On February 16, 1999, Dr. Malone had performed a discectomy and fusion at the C4-5 vertebrae level. Dr. Malone had released claimant to return to regular truck driving duties without restrictions or any permanent functional impairment in July 1999. Claimant did not have any further neck problems until the September 15, 1999 accident.

12. As a result of this current neck injury, after an attempt of conservative treatment failed, in March 2000, Dr. Malone performed an anterior cervical discectomy and fusion at the C5-6 vertebrae level.

13. Dr. Malone released claimant to return to work on July 12, 2000, but this time claimant was released to only light work with permanent restrictions of no overhead work and no lifting, pushing, or pulling of more than 20 pounds.

CONCLUSIONS OF LAW

1. The claimant has the burden of proving that her injury arose out of and in the course of her employment with respondent.[1]

2. An accidental injury occurs in the course of employment when the accidental injury happens while the employee is at work in the employer's service.[2]

3. An accidental injury arises out of the employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[3]

4. But the accidental injury does not arise out of and in the course of employment when the accidental injury occurs while the employee is on the way to assume the duties of employment or after leaving such duties and the injury is not caused by the employer's negligence.[4]

5. The ALJ found claimant was injured while loading personal items and logbooks necessary to complete a trip to pick up a load as directed by the respondent. The ALJ, therefore, found claimant's injury occurred after she had assumed her required employment duties.

The Appeals Board agrees with the ALJ and concludes claimant injured her neck as she was entering the tractor with personal items and logbooks required to complete a trip directed by the respondent to pick up a load of merchandise. If the worker is at work and is injured either while actually doing the work or while performing an act that is normally and commonly incidental to the work, the injury "arises out of" the employment. Any other construction would undermine the Act and lead to absurd results.[5]

6. Respondent also argues that claimant's neck injury was not caused by a risk associated with the employment but was a personal risk and therefore not compensable.[6]

Here, as in *Martin*, respondent argues that claimant's neck injury did not have any causal connection to a risk associated with the employment but was a result of claimant's preexisting neck injury, a personal risk.

---

[1] *See* K.S.A. 1999 Supp. 44-501(a).

[2] *See Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[3] *See Kindel*, 258 Kan. at 278.

[4] *See* K.S.A. 1999 Supp. 44-508(f).

[5] *See Bailey v. Mosby Hotel Co.*, 160 Kan. 258, 267, 160 P.2d 701 (1945).

[6] *See Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

The Appeals Board disagrees with the respondent's argument. The Appeals Board acknowledges that claimant had a preexisting neck injury and surgery. But there is no evidence in the preliminary hearing record that claimant's preexisting neck injury caused or was aggravated as a result of the September 15, 1999 work-related accident. In fact, claimant's current neck injury is the result of a significant trauma that occurred when she hit her head on the tractor's upper door frame, and the location of the injury is at a different vertebrae level. Additionally, after claimant's first neck injury and surgery, there is no evidence that claimant had any residual symptoms or any permanent restrictions. In contrast, in *Martin*, the Court found "it is obvious that almost any everyday activity would have a tendency to aggravate his condition, *i.e.,* bending over to tie his shoes, getting up to adjust the television, or exiting from his own truck while on a vacation trip."[7]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on July 19, 2000, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

c: Alan D. Herman, Wichita, KS
D. Steven Marsh, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director

[7] *See Martin*, 5 Kan. App. 2d at 300.